PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

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Ratesetting

TO PARTIES OF RECORD IN APPLICATION 13-05-017:

This is the proposed decision of Administrative Law Judge Robert M. Mason III. Until and unless the Commission hears the item and votes to approve it, the proposed decision has no legal effect. This item may be heard, at the earliest, at the Commission's September 12, 2019 Business Meeting. To confirm when the item will be heard, please see the Business Meeting agenda, which is posted on the Commission's website 10 days before each Business Meeting.

Parties of record may file comments on the proposed decision as provided in Rule 14.3 of the Commission's Rules of Practice and Procedure.

The Commission may hold a Ratesetting Deliberative Meeting to consider this item in closed session in advance of the Business Meeting at which the item will be heard. In such event, notice of the Ratesetting Deliberative Meeting will appear in the Daily Calendar, which is posted on the Commission's website. If a Ratesetting Deliberative Meeting is scheduled, *ex parte* communications are prohibited pursuant to Rule 8.2(c)(4)(B).

/s/ ANNE E. SIMON
Anne E. Simon
Chief Administrative Law Judge

AES:mph
Attachment

Decision **PROPOSED DECISION OF ALJ MASON (Mailed 8/5/2019)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of California-American Water Company (U210W) for an Order (1) Approving a Settlement Agreement With the County of Monterey and the Monterey County Water Resources Agency To Settle and Resolve Claims and Issues Between the Parties and to Promote the Development, Construction and Operation Of a Water Supply Project for Monterey County on an Expedited Basis, and (2) Authorizing the Transfer of Authorized Costs Related to the Settlement Agreement to Its Special Request 1 Surcharge Balancing Account.	Application 13-05-017

DECISION AFFIRMING DECISION 15-03-002 AND DECISION 15-10-052 FOLLOWING REMAND FROM THE CALIFORNIA SUPREME COURT

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DECISION AFFIRMING DECISION 15-03-002 AND DECISION 15-10-052 FOLLOWING REMAND FROM THE CALIFORNIA SUPREME COURT

Summary

This decision affirms the previous Decisions 15-03-002 and 15-10-052 that the Commission adopted in this proceeding in favor of the Applicant, California-American Water Company, that approved the confidential designation and treatment given to Exhibit D, a document that contained legal invoices and costs incurred by counsel for the County of Monterey in connection with the Regional Desalination Project. Applying the standards set forth by the California Supreme Court and, on remand, by the California Court of Appeal, the Commission concludes that Exhibit D contained information protected from disclosure by, at a minimum, the attorney-client privilege. As such, there is no basis to modify or reverse Decisions 15-03-002 and 15-10-052.

This decision also finds that even if complaining parties had been given an unreadacted version of Exhibit D prior to the commencement of evidentiary hearings, the outcomes in Decisions 15-03-002 and 15-10-052 would be the same. Those Decisions reached their conclusions that authorized California-American Water Company to recover from ratepayers the amount of $1,918,033 by relying on prior Commission precedent that was not challenged in the *Application for Rehearing* or in the *Petition for Review* in the California Supreme Court.

This proceeding is closed.

1. Introduction

As set forth in the Public Utilities Code and the California Constitution, the Commission is responsible for ensuring that California's investor-owned water utilities deliver clean, safe, and reliable water to their customers at reasonable

rates.[1] To fulfill that responsibility, the Commission regularly addresses general rate case applications which can be relatively straightforward regulatory proceedings.

But this proceeding has been anything other than straightforward. Because of the history of Monterey water projects, as well as the parties' contentiousness, the request by California-American Water Company to recoup legal fees and costs (compiled in a document called Exhibit D) related to the Regional Desalination Project has spawned nearly fifteen years of proceedings before the Commission, two companion lawsuits filed in the San Francisco Superior Courts, and appeals to both the California Court of Appeal and the California Supreme Court. The Commission is now tasked with determining, considering the California Supreme Court's holding in a facially similar case, if its previous two decisions adopted in California-American Water Company's favor should be reversed, revised, or remain intact.

In resolving the legal wrangling (which involves claims of attorney-client privilege, consumer privacy, confidentiality, waiver, mootness, and an unsubstantiated charge of criminal malfeasance lobbed into the mix for good measure), the Commission will set forth some of the detailed backstory of proceedings. We believe that this is both necessary and helpful in resolving the legal claims since certain parties claim that prior actions taken by other parties impact the viability of their current legal positions that have been proffered, and ultimately dictate how the Commission should rule.

[1] Pub. Util. Code § 451; and California Constitution, Article XII, § 3.

2. Background

2.1. Events Leading Up to A.04-09-019

State Water Resources Control Board Order No. 95-10 requires California-American Water Company (Cal-Am) to develop an alternate water supply for its Monterey County customers sufficient to replace 10,730 acre feet of water per year.[2] In response, Cal-Am proposed a dam and reservoir, and a Coastal Water Project that was succeeded by the Regional Desalination Project.[3] The development of the Regional Desalination Project was the result of a Settlement Agreement between Monterey County Water Resources Agency (MCWRA), Cal-Am, and Marina Coast Water District (MCWD), with the settlement being implemented through a Water Purchase Agreement.

2.2. A.04-09-019

In A.04-09-019, Cal-Am sought approval of the Settlement Agreement and the Water Purchase Agreement. In Decision (D.) 10-12-016, the Commission approved the Regional Desalination Project and adopted the proposed settlement agreement. Under its terms, MCWRA agreed to own, construct, operate, and maintain the source water wells and raw water conveyance facilities to desalination plant. MCWD agreed to own, construct, operate, and maintain the desalination plant and the product water conveyance facilities to the delivery point, which would then become Cal-Am's intake point. Cal-Am would own, construct, operate, and maintain the pipeline, conveyance, and pumping facilities necessary to deliver the water to its customers. A.04-09-019 remained open to consider rate base offsets for Cal-Am facilities, as well as cost allocation and rate design issues.

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[2] D.15-03-002 at 23, Finding of Fact 16.

[3] *Id.*, Findings of Fact 17 and 18.

2.3. A.09-04-015

Around the time the Regional Desalination Project and Water Purchase Agreement were being negotiated, Cal-Am, MCWRA, and MCWD entered into a Reimbursement Agreement in which Cal-Am agreed until the end of 2010, to reimburse MCWRA and MCWD for their costs in pursuing the Regional Desalination Project. Cal-Am filed A.09-04-015, seeking authorization to transfer $5,620,977 in preconstruction costs for the Coastal Water Project for recovery from its ratepayers. Cal-Am, MCWRA, and MCWD filed a joint motion for expedited approval of the Reimbursement Agreement. In D.10-08-008, the Commission approved the Reimbursement Agreement.[4]

In D.12-07-008, the Commission addressed Cal-Am's *Motion to Withdraw its Petition to Modify D.10-12-016*. Cal-Am advised the Commission that the Regional Desalination Project was not reasonable and that alternative desalination projects were under consideration. The Commission granted Cal-Am's *Motion to Withdraw* and closed A.04-09-019. Yet in doing so, the Commission stated that a separate proceeding that Cal-Am had filed— A.12-04-019 — would be a replacement for A.04-09-019. The Commission also instructed Cal-Am to file a separate application to deal with disputed and undisputed costs, and cost recovery relative to A.04-09-019. Accordingly, rate recovery of the disputed costs by MCWRA and MCWD in A.04-09-019 with respect to the Regional Desalination Project was reserved and then taken up in the instant proceeding. But before A.13-05-017 was filed, Cal-Am filed another application which the Commission next discusses.

[4] *Decision Approving Partial Settlement Agreement and, With Modifications, Reimbursement Agreement*.

2.4. A.12-04-019

In A.12-04-019, Cal-Am filed an application for approval of the Monterey Peninsula Water Supply Project and for authorization to recover all present and future costs in rates.

In D.16-09-021, the Commission approved Cal-Am entry into an agreement to purchase water from a project developed by other local agencies in Monterey County.

In D.18-09-017, the Commission approved a modified Monterey Peninsula Water Supply Project, and adopted two of three proposed settlement agreements.

2.5. The First San Francisco Superior Court Litigation

Around the same time frame that Cal-Am filed A.12-04-019, Cal-Am sued both MCWRA and MCWD in San Francisco Superior Court on October 4, 2012, entitled *California-American Water Company v. Marina Coast Water District and Monterey County Water Resources Agency*, Case No. CGC13528312 (*San Francisco Litigation I*), seeking declaratory relief that the Regional Desalination Project agreements (one of which was the Reimbursement Agreement in which Cal-Am agreed to reimburse MCWD and MCWRA their costs in pursuing the Regional Desalination Project) were void under Government Code § 1090, and that Cal-Am had the right to terminate the agreements, regardless of any conflict of interest, as a result of MCWRA's anticipatory repudiation of them. But after filing *San Francisco Litigation I*, Cal-Am reached a settlement agreement with MCWRA and County of Monterey (County) of all claims among them.[5] During

[5] Declaration of Richard Svindland at ¶ 3. Cal-Am continued to pursue *San Francisco Litigation I* against MCWD concerning project costs. Following a bench trial, the court determined that the various agreements, including the Reimbursement Agreement, were void by reason of a conflict of interest (*i.e.* a board member Stephen Collins who provided consulting services had a

the course of the settlement discussions, MCWRA and the County provided to Cal-Am the redacted version of the invoices that are captured collectively and later identified as Exhibit D.[6] Redactions were made to the invoices on the basis of the attorney-client privilege and work product protection, as well as relevancy grounds and the need to protect personal financial information.[7]

2.6. The Instant Proceeding

On May 24, 2013, Cal-Am filed the instant proceeding seeking approval of the settlement reached in *San Francisco Litigation I*, approval of Cal-Am's payment of MCWRA's project costs including legal fees and costs incurred in connection with A.04-09-019, and rate recovery for Cal-Am in the amount of its settlement payment to MCWRA.[8] As part of its application, Cal-Am filed Exhibit D under seal, and concurrently with its application filed a *Motion to File Confidential Invoices Under Seal Exhibit D to Application* (*Motion to File Under Seal*) pursuant to Rule 11.4, General Order 66-C, and Pub. Util. Code § 583. Cal-Am asserted that the invoices were provided by MCWRA and County during confidential settlement discussions, and contained redactions of information protected by the attorney-client privilege and work product protection. MCWD, WaterPlus, Citizens for Public Water, and Public Trust Alliance filed responses opposing the *Motion to File Under Seal*.

On August 19, 2013, the assigned Administrative Law Judge (ALJ) issued her *Ruling* granting Cal-Am's *Motion to File Under Seal* and approved the terms of

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conflict of interest as he who stood to gain financially from the agreements). The decision was affirmed on appeal. *California-American Water Co. Marina-Coast Water District et al* (2016) 2 Cal.App.5th 748, rev. denied (Nov. 9, 2016 Cal. LEXIS 9065).

[6] Declaration of Richard Svindland at ¶ ¶ 4 and 5.

[7] *Id.*, at ¶ 6.

[8] *Application* at 1-2, Exhibit A thereto at 3, ¶ U and 4 § 1,

a protective order and non-disclosure agreement (NDA). Parties who signed the NDA would be given access to Exhibit D for use only in the instant proceeding.

Following the November 12, 13, and 18, 2013, evidentiary hearings, ALJ Wilson invited the parties to submit additional briefing on the privilege issues concerning Exhibit D. MCWRA, Cal-Am, and the Office of Ratepayer Advocates (ORA) filed opening briefs on November 21, 2013. On November 25, 2013, MCWRA filed a reply to ORA's opening brief, and ORA filed its reply to MCWRA and Cal-Am's opening briefs. MCWD did not respond to the November 21, 2013 briefs. Instead, on December 2, 2013, MCWD filed what it termed a *Request for Notice and an Opportunity to Be Heard on Confidentiality and Redaction Issues Under Consideration* (*Request*). On December 5, 2013, Cal-Am filed its *Opposition to the Request*. Through its *Request*, MCWD states it wants to play a role in making decisions concerning documents covered by the NDA, although MCWD chose not to sign the NDA. Thus, it is not clear what input MCWD could provide regarding a NDA it chose not to execute.

In D.15-03-002, the Commission adopted, in part, the settlement agreement between Cal-Am, County, and MCWRA, wherein Cal-Am was authorized to recover $1,918,033 from its Monterey District ratepayers to reimburse the County for part of the expenses incurred on the Regional Desalination Project.[9] D.15-03-002 also affirmed that Exhibit D (which consists of documentation of MCWRA's legal fees incurred in A.04-09-019) to the settlement would be treated confidentially and that the confidentiality would last for three years after D.15-03-002's March 18, 2015 issuance.[10]

[9] D.15-03-002 at Ordering Paragraphs (OP) #s 1 and 2.

[10] *Id.*, at OP # 4.

On April 17, 2015, MCWD filed an application for rehearing, claiming that the Commission committed multiple legal errors when it agreed to seal Exhibit D.

On October 23, 2015, the Commission adopted D.15-10-052, which denied MCWD's application for rehearing. The Commission rejected MCWD's claim that disclosure of Exhibit D was required because rate recovery was sought and granted based on the information in Exhibit D. The Commission noted that D.15-03-002 affirmed the ALJ's ruling of August 19, 2013, which granted Cal-Am's *Motion to File Under Seal*.[11] The Commission noted that MCWD had the opportunity to access the documents in Exhibit D for use in this proceeding, but made the election not to sign the NDA.[12] The Commission also found that MCWD failed to demonstrate that unsealing Exhibit D "would have an effect on any material issue in the Decision,"[13] or that unsealing Exhibit D would affect the authorization of Cal-Am's rate recovery of $1.9 million.[14] Finally, the Commission noted that D.15-03-002 authorized the recovery of fees and related costs after finding they were authorized by prior Commission Decisions 10-08-008 and 11-09-039.[15] Since MCWD's Application for Rehearing did not challenge the authorization of Cal-Am's recovery of these fees and related costs, MCWD has foreclosed from challenging that aspect of the Decision.[16]

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[11] D.15-10-052 at 4.

[12] *Id.*, at 5.

[13] *Id.*

[14] *Id.*, at 6.

[15] *Id.*

[16] *Id.*

2.7. The California Supreme Court Proceedings

On November 20, 2015, MCWD filed a *Petition for Writ of Review* (*Writ*) before the California Supreme Court. MCWD claimed, *inter alia*, that the Commission committed constitutional error when it denied MCWD and other parties in this proceeding unrestricted access to Exhibit D, when the Commission relied on Exhibit D as an evidentiary basis for its ultimate decision in the proceeding.[17] MCWD also argued that in light of the fact that the California Supreme Court granted review in *Los Angeles County Board of Supervisors v. Superior Court* (*American Civil Liberties Union*), No. 5226645, a case that presents an issue similar to the one in the *Writ*, the California Supreme Court should grant and hold the *Writ* until after the *Los Angeles County* proceeding was resolved.[18]

On March 23, 2016, the California Supreme Court granted the *Writ* but deferred further action "pending consideration and disposition of a related issue in" the *Los Angeles* proceeding.[19]

On December 29, 2016, the California Supreme Court issued its decision in *Los Angeles*.[20] It held that the attorney-client privilege does not categorically shield everything in a billing invoice from disclosure under the California Public Records Act (Gov. Code § 6250 *et. seq*.) The attorney-client privilege does, however, protect the confidentiality of invoices for work in pending and active legal matters.

On May 10, 2017, the California Supreme Court issued an order stating: "The above-entitled matter is returned to the Public Utilities Commission for

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[17] *Writ* at 1-2.

[18] *Id*.

[19] Docket entry March 23, 2016, Case No. S230728.

[20] 2 Cal.5th 282.

reconsideration in light of the decision in *Los Angeles County Board of Supervisors v. Superior Court* (2016) 2 Cal.5th 282." Beyond that, there is no express set aside or reversal of either D.15-03-002 or D.15-10-052. Given the terseness of the order, there is, understandably, considerable disagreement between the parties as to what action the Commission should take following the remand.

2.8. The Second San Francisco Litigation

While the instant proceeding has been pending, on July 1, 2015, Cal-Am, and MCWRA filed a new lawsuit in the San Francisco Superior Court entitled *California-American Water Company, et al., v. Marina Coast Water District, et al, and Related Cross Claims and Consolidated Actions*, Case No. CGC-15-546632 (the *San Francisco Litigation II*), which asserted various business torts against MCWD arising from the conflict of interest allegations first raised and resolved in the *San Francisco Litigation I* which resulted in the agreements, including the Reimbursement Agreement, being rendered void. The *San Francisco Litigation II* is still pending.

On November 19, 2018, MCWRA and County filed a *Notice of Production in Discovery in Pending Civil Litigation of Substantially Less Redacted Versions of Documents in Exhibit D to Application in This Proceeding* (*Notice*). The *Notice* states that in the pending *San Francisco Litigation II*, MCWRA produced what it termed a "substantially less redacted" version of Exhibit D, with the remaining redactions falling into two categories:

- Sensitive personal information such as credit card numbers, account numbers for frequent flier or traveler clubs, account numbers for venders or suppliers, telephone numbers, and addresses; and
- Document content that describes attorney services, tasks performed by MCWRA personnel, and expenses,

> if they were unrelated to desalination project issues or the Stephen Collins conflict of interest issue.

The *Notice* also makes two important disclosures that are relevant to this proceeding: first, MCWD is a party to the *San Francisco Litigation II* and has received a copy of Exhibit D. Second, MCWRA states it is willing to provide Exhibit D to the other parties in this proceeding via an Internet sharing site. Although the *Notice* states that it is not intended to benefit or detract from any party's position regarding the issues related to Exhibit D that are currently pending before the Commission, the production of Exhibit D does raise the question of whether the issues brought to the California Supreme Court's attention are now moot. The Commission resolves the mootness question at Section 4.2, *infra*.

2.9. Developments in Instant Proceeding Following Remand from the California Supreme Court

On June 29, 2017, MCWD filed its *Motion for an Order Unsealing Evidence, Setting Aside Decisions and Establishing a Briefing Schedule on Remand of Petition for Writ of Review for the California Supreme Court (No. S230728) Directing the Commission's Reconsideration* (*Motion*).

On January 19, 2018, the assigned ALJ noticed a prehearing conference (PHC) for February 5, 2018. The following parties filed PHC statements on January 31, 2018: Water Plus; Public Water Now; MWCD; and a Joint PHC statement was filed by Cal-Am, MCWRA, and County. The parties identified various legal issues for resolution by legal briefing.

On February 5, 2018, the PHC was held. No party expressed an intent to file a motion pursuant to D.15-03-002, OP 4, to request that Exhibit D remain under seal after the expiration of the three-year period. And since the PHC, no

such motion has been filed, meaning whatever attorney-client privilege that attached previously to Exhibit D expired on or about March 18, 2018.

Additionally, any reporter's transcripts that were either sealed or redacted on the same confidentiality grounds may now be made available to any party in this proceeding, without redactions, upon request and payment of the required transcript fee.

On February 26, 2018, County, MCWRA, and Cal-Am jointly filed a *Notice of Pertinent Appellate Case: Los Angeles County Board of Supervisors v. Superior Court (ACLU of Southern California)* (2017) 12 Cal.App.5th 1264.

On August 13, 2018, MCWRA filed an *Emergency Motion for Immediate Stay of Ordering Paragraph 5 of Assigned Commissioner's Scoping Memo and Ruling Issued August 10, 2018* (*Emergency Motion).* MCWRA argued that the paragraph 5 of the Scoping Ruling required service of the unredacted version of Exhibit D to the parties by August 15, 2018, and MCWRA claimed that Exhibit D contained attorney-client privileged communications and some work product protected information that support costs to be forgiven from collection from or paid to MCWRA under the settlement that is the subject of this proceeding. Specifically, Exhibit D includes attorney invoices from Downey Brand LLP and from the Monterey County Counsel's office. By not granting the *Emergency Motion*, the parties would be denied the opportunity brief the legal issues identified in the Scoping Ruling, thus rendering the *Scoping Ruling* issues moot.

On August 15, 2018, Public Trust Alliance filed its response to *MCWRA's Emergency Motion*. On August 15, 2018, MCWD filed its response to *MCWRA's Emergency Motion.*

On August 15, 2018, the assigned Administrative Law Judge issued a *Ruling Granting MCWRA's Emergency Motion*.

On August 21, 2018, the assigned Administrative Law Judge issued a *Ruling* amending the briefing schedule for *MCWD's Motion* and for the issues identified in the *Scoping Ruling*. Subsequent rulings on August 29, 2018 and September 5, 2018 from the assigned Administrative Law Judge made additional adjustments to the briefing schedule for *MCWD's Motion* and *MCWRA's Emergency Motion,* respectively.

On September 20, 2018, MCWRA filed its response to *MCWD's Motion* along with a *Request for Official Notice* (*Request*). Pursuant to Rule 13.9 of the Commission's Rules of Practice and Procedure, and Evidence Code § 452(d), MCWRA requested that the Commission take official notice of the following pleadings from *California-American Water Company, et al., v. Marina Coast Water District, et al, and Related Cross Claims and Consolidated Actions*, Case No. CGC-15-546632 (the *San Francisco Litigation II*):

- *Order Sustaining in Part Cal-Am's Demurrers to Marina's Third Amended Complaint and Sustaining Monterey's Demurrers to Marina's Third Amended Complaint*;
- *California-American Water Company and Monterey County Water Resources Agency's Joint Fifth Amended Complaint for Damages*; and
- *Case Management Order No. 10*.[21]

On September 20, 2018, Cal-Am filed its response to *MCWD's Motion*, accompanied by the Declaration of Richard Svindland, president of Cal-Am.

On October 4, 2018, MCWD filed its reply in support of its *Motion*.

[21] The Commission grants the request for Official Notice and recognizes the existence of these pleadings in the *San Francisco Litigation II* docket.

On November 19, 2018, MCWRA filed its *Notice of Substantially Less Redacted Versions of Documents in Exhibit D to Application in this Proceeding*. The remaining redactions fell into two categories:

- Sensitive personal information (such as credit card numbers, account numbers, or frequent flier accounts, numbers, telephone numbers, and addresses); and
- Documents contents that describe attorney services and tasks performed on matters unrelated to the Regional Desalination Project issues.

On May 24, 2019, counsel for MCWRA hand delivered a copy of Substantially Less Redacted Versions of Documents in Exhibit D in DVD format. Exhibit D is 755 pages of documents Bates stamped MCWRA03781-MCWRA04974, consisting of:

- Invoices from the law firm of Downey Brand with related costs;
- Invoices from County Counsel for the County of Monterey with related costs;
- Invoices summarizing legal fees and costs;
- Cost invoices for legal fees and expenses; and
- Miscellaneous non-privileged documents.

As represented in the *Notice* of November 18, 2018, the various pages contained redactions that fell within the two enumerated categories.

3. Legal Issues for Resolution

- Considering the California Supreme Court's *Los Angeles* Decision, should the Commission revise, amend, or reverse (in whole or in part) D.15-03-002 and/or D.15-10-052 and, if so, how?
- What impact, if any, does the unredacted version of Exhibit D have on D.15-03-002 and/or D.15-10-052?

4. Discussion

4.1. Introduction

Following the remand from the California Supreme Court, the Commission has been tasked with determining the extent to which the attorney-client privilege (or any other privileges or considerations not addressed by the California Supreme Court in *Los Angeles*) apply to prevent complaining parties from obtaining access to all or parts of Exhibit D.[22] But before *Los Angeles'* impact on the claims of privilege that have been asserted and recognized by the Commission can be fully evaluated, a few preliminary observations are in order regarding the applicability and scope of privilege claims, and how those claims must be balanced against requests made under the California Public Records Act (PRA).[23]

First, the Commission acknowledges the importance of the attorney-client privilege as it has been "a hallmark of Anglo-American jurisprudence for almost 400 years." (*Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599.)[24] Its fundamental purpose is to safeguard the confidential relationship between clients and their attorneys to promote full and frank discussion of the facts and

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[22] An assertion of the attorney-client privilege requires proof of (1) an attorney-client relationship (Evidence Code §§ 951 and 954); (2) a confidential communication between client and lawyer during the course of the attorney-client relationship (Evidence Code § 952); and (3) a privilege claim by either the holder of the privilege or by a person authorized to claim the privilege on behalf of the holder (Evidence Code § 954).

[23] Although MCWD never requested a copy of Exhibit D pursuant to the PRA, Los Angeles' discussion of the PRA makes it necessary for the Commission to address the same issue in resolving the claims of privilege, confidentiality, the public's right to government documents.

[24] The privilege is set forth in Evidence Code § 954: "Subject to Section 912 and except as otherwise provided in this article, the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer…."

tactics surrounding individual legal matters.[25] While written fee agreements have been recognized as falling within the definition of a confidential communication for purposes of the attorney-client privilege,[26] billing invoices require a more nuanced consideration of whether the attorney-client privilege is applicable.

Second, application of the attorney-client privilege's is not limited to disputes in superior court but has been applied to administrative proceedings as well. In fact, the California Supreme Court has held that the attorney-client privilege applies in Commission proceedings.[27] In light of that application, the Legislature and the Commission have established procedures to allow parties and regulated entities to assert the attorney-client privilege, along with other applicable privileges, as to documents submitted in both open proceedings and as part of a required regulatory filing.[28] When a party wishes to challenge a claim of privilege, or a person submits a PRA request for a document arguably

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[25] *Id.*

[26] *See* Business & Professions Code § 6149 ("A written fee contract shall be deemed to be a confidential communication within the meaning of subdivision (e) of Section 6068 and of Section 952 of the Evidence Code .")

[27] *See Southern California Gas Co. v. Public Utilities Commission* (1990) 50 Cal.3d 31, 38-39 ("It is evident that the privilege applies in the administrative law setting," and that "the commission's powers pursuant to the state Constitution in this context are subject to the statutory limitation of the attorney-client privilege.")

[28] *See, e.g.* Pub. Util. Code § 583 ("No information furnished to the commission by a public utility, or any business which is a subsidiary or affiliate of a public utility, or a corporation which holds a controlling interest in a public utility…shall be open to public inspection or made public except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding."); and General Order 66-D (*Procedures for (1) Submission of Information to the California Public Utilities Commission With Claims of Confidentiality, (2) Submission of Request Per the California Public Records Act, and (3) the Release of any Information by the Commission, Including Pursuant to the California Public Records Act*). The Commission recently updated these procedures in Decision (D.) 16-08-024 (*Decision Updating Commission Processes Relating to Potentially Confidential Documents*).

protected by privilege, the Commission will determine if the privilege claim has been properly established.[29]

Third, the right to government documents pursuant to a PRA request is not absolute. A government entity must employ a balancing test when faced with a PRA request that potentially conflicts with a claim of privilege or confidentiality. The PRA was enacted for the purpose of increasing freedom of information by giving members of the public access to records in the possession of state and local agencies. (*Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 425.)[30] Such access to information concerning the conduct of the people's business "is a fundamental and necessary right of every person in this state." (Government Code § 6250.)

But the right of access must be balanced against the PRA's recognition that access must be tempered and may not take precedence over a legitimate claim of a privilege recognized by the Evidence Code. (*See* Government Code § 6254 (k).)[31] In addition, the PRA contains a catchall provision that allows a government agency to withhold a public record if it can demonstrate that "on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record."

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[29] *See, e.g.* Decision 17-09-023 (*Phase 2A Decision Adopting General Order 66-D and Administrative Processes for Submission and Release of Potentially Confidential Information*); and Resolution No. L-572 (*Resolution Addressing Appeal of Legal Division Public Records Office's Disposition of Public Record Request PRA #18-120*).

[30] In addition, as a result of a 2004 initiative, the voters enshrined the PRA's right of access into the California Constitution. (*See* Cal. Const., Art. I, § 3, subd. (b)(1) ["The people has the right of access to information concerning the conduct of the people's business, and, therefore,…the writings of public officials and agencies shall be open to public scrutiny."].)

[31] Government Code § 6254 (k) states that an agency may withhold "records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege."

(Government Code § 6255 (a).) This catchall provision is largely concerned with protecting "the privacy of persons whose data or documents come into governmental possession." (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1282), and is consistent with the Legislature's declaration that in enacting the PRA the Legislature expressed its "concern for individual privacy as well as disclosure." (*Black Panther Party v. Kehoe* (1974) 42 Cal.App.3d 645, 652.)[32] Though the terms are sometimes used interchangeably, the PRA recognizes three distinct categories that would provide the government with bases for refusing to produce information requested: a privilege recognized by the Evidence Code, confidentiality, and the individual's right to privacy.

Finally, the Commission must also determine if any other privileges or protections are applicable to Exhibit D that *Los Angeles* did not address.

4.2. The Issues that the California Supreme Court Remanded to the Commission have not been Rendered Moot by the Production of Exhibit D in San Francisco Litigation II

California courts will only decide "justiciable controversies." (*Association of Irritated Residents v. Department of Conservation* (2017) 11 Cal.App.5th 1202, 1221.) A moot case, on the other hand, is one in which there may have been an actual or ripe controversy at the outset, but due to intervening events, it no longer presents a context in which the court can grant effectual relief. (*Id.*) the mootness doctrine is also applicable to administrative proceedings and has also

[32] *See* also *American Civil Liberties Union Foundation v. Deukmejian* (1982) 32 Cal.3d 440, 447 ("In the spirit of this declaration, judicial decisions interpreting the Act seek to balance the public right to access to information, the government's need, or lack of need, to preserve confidentiality, and the individual's right to privacy.")

been invoked at the Commission when warranted by the particular facts of a case.[33]

But a court or the Commission can opt not to apply the mootness doctrine where, as in the instant case, an intervening event has occurred. If the issue presented for resolution is "one of continuing public interest and likely to recur in the future, it should not be ignored by relying on the mootness doctrine." (*Agricultural Labor Relations Board v. Glass* (1985) 175 Cal.App.3d 703, 712, citing to *Daly v. Superior Court* (1977) 19 Cal.3d 132, 141.) While it may be that the recently produced version of Exhibit D may moot the current dispute since the entries previously redacted on attorney-client privilege grounds have now been made available for production, the Commission does not believe that this proceeding should be dismissed on mootness grounds for two reasons. First, the question of whether parties to a ratesetting proceeding are entitled to review legal invoices arguably protected by the attorney-client privilege, the total of which may be included in rates charged to ratepayers, is an issue of ongoing public interest. Other regulated entities may seek Commission authority to pass on legal expenses as part of the rates charged to consumers so future parties may benefit from the analysis the Commission undertakes in balancing and resolving the claims of privilege against the policy in the PRA encouraging the disclosure of documents possessed by a public agency. Second, the issue is likely to recur and affect the future rights of the parties. Cal-Am, MCWRA, and MCWD have been engaged in litigation in Superior Court and in proceedings before this Commission going back at least fifteen years, and there may well be future legal

[33] *See Farney v. Stockton Port District* (1939) 12 Cal.2d 653, 656; Decision 07-07-022 (*Order Dismissing as Moot the Application for Rehearing of Decision 03-01-077 Filed by The Utility Reform Network and Granting the Request for Withdrawal of Application for Rehearing Filed by Verizon California Inc.*)

wrangling that involves disputes over access to information arguably protected by the attorney-client privilege. Accordingly, the Commission deems it appropriate to decide whether Exhibit D was properly shielded from public disclosure on attorney-client privilege grounds.

4.3. The California Supreme Court's *Los Angeles* Decision Does Not Require that the Commission Revise, Amend, or Reverse D.15-03-002 and/or or D.15-10-052

To understand why *Los Angeles* does not require that the Commission revise, amend, or reverse D.15-03-002 and/or D.15-10-0532 it will first be helpful to discuss the facts and ultimate holding in the decision. Following several publicized inquiries into allegations of excess force against inmates in the Los Angeles County jail system, the American Civil Liberties Union (ACLU) of Southern California submitted a public records act request pursuant to Government Code § 6254 to the Los Angeles County Board of Supervisors and the Office of the Los Angeles County Counsel for invoices specifying the amounts the that County had been billed by any law firm in connection with nine different lawsuits alleging excessive force against jail inmates. The County agreed to produce copies of invoices related to three lawsuits that were no longer pending, with attorney-client privileged and work product information redacted. The County declined to provide invoices for the remaining six lawsuits which were still pending, reasoning that the invoices contained detailed descriptions that reflected attorney thought processes, strategies, and amount of attorney work performed, which were privileged under Evidence Code § 950 *et seq* and therefore exempt from disclosure.

Following the ACLU's petition for writ of mandate, the matter made its way to the California Supreme Court which reversed the decision from the Court of Appeal that all nine invoices were confidential communications within the

meaning of Evidence Code § 952. In resolving the controversy, the Court drew a distinction between (1) the six pending and active legal matters and (2) the three concluded legal matters. As to pending and active legal matters, the Court held that invoices are so closely related to attorney-client communications that they implicate the heartland of the privilege. As such, the privilege protects the confidentiality of the work invoices in pending and active legal matters.[34]

As for concluded legal actions, the Court's determination was more restrictive in its application of the privilege. It reasoned that invoices that reflected fee totals do not always reveal the substance of legal consultation. Instead, whether the production of an invoice from a concluded legal matter would invade the attorney-client privilege turns on whether the fee totals reveal anything about the substance of the legal consultation. But without a fully developed factual record to answer that question, the Court remanded the matter to the lower courts for further consideration consistent with *Los Angeles'* holding.

Upon remand, the Court of Appeal held that (1) invoices related to pending or ongoing litigation were privileged; (2) whether fee totals in concluded litigation were privileged was a factual question for the trial court; and (3) the redacted portions of law firm invoices in concluded matters were not subject to disclosure.[35] The Court of Appeal directed the superior court to conduct a hearing to determine whether fee totals in any concluded matter should be disclosed.[36]

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[34] The attorney-client privilege has been deemed vital to the effective administration of justice. (*Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 380.) It is undisputed that the attorney-client privilege holds a special place in the law of California. (*See Mitchell v. Superior Court* (1984) 37 Cal.3d 591, 599.

[35] (2017) 12 Cal.App.5th 1264.

[36] *Id*., at 1276-1277.

Yet, in doing so, the Court of Appeal was careful to note that *Los Angeles* only dealt with fee totals, and did not discuss billing entries or other aspects of an attorney's invoice.[37] In the Court of Appeal's view, information regarding such billing entries on an invoice would be within the scope of the attorney-client privilege: "Other than fee totals, we can conceive of nothing likely to be contained in a typical billing invoice besides time entries, that is, information from the lawyer to the client regarding the amount and nature of work performed. According to *Los Angeles County*, information regarding such billing entries is within the scope of the privilege."[38]

In sum, what the Commission gleans from *Los Angeles* and from the Court of Appeal's decision following remand, is that in a pending and active legal matter, the following items in an attorney invoice are protected by the attorney-client privilege:

- Individual billing entries (*i.e.* the description of the legal work performed, the identity of who performed the work, the hourly rate, and the amount charged for each entry) that inform the client of the nature or amount of work occurring in connection with a pending legal issue; and
- Fee totals that represent the amount spent on legal representation because they reveal in real time clues about legal strategy.

Having set forth *Los Angeles'* holding, the Commission will now explain why the California Supreme Court's decision does not lead to the revision, amendment, or reversal of D.15-03-002 and/or D.15-10-053.

[37] *Id.*, at 1275.

[38] *Id.*

4.3.1. This Proceeding is Pending and Active

While *Los Angeles* distinguished pending and active from concluded proceedings, it did not define these terms. Generally, a proceeding is pending and active from the time of its commencement until its final determination on appeal, or until the time for appeal has passed. (Code of Civil Procedure § 1049.) That definition applies to matters such as the ones in *Los Angeles* as they were initiated in state superior court action and are, therefore, governed by the Code of Civil Procedure.

But Commission proceedings, being administrative, are subject to the dictates of the Public Utilities Code and the Commission's Rules of Practice and Procedure. As Cal-Am's application was characterized as ratesetting, it remains open from the date it was accepted for filing until such time as the Commission issues a decision resolving the issues within the statutory deadline and indicates that the proceeding is closed.[39] Here, D. 15-03-002 closed this proceeding on March 12, 2015.[40] But after *Los Angeles* was decided, the Commission reopened this proceeding. Thus, this reopened proceeding is pending and active as that term is used in *Los Angeles*.

4.3.2. Pending and Active Versus Closed Proceedings and the Application of the Attorney-Client Privilege

This distinction between pending and active and closed proceedings was important in *Los Angeles* since it impacts the level of protection that will be granted to a legal invoice that is claimed to be privileged.

Fee Totals and Individual Billing Entries

[39] Pursuant to Pub. Util. Code § 1701.5(a), a ratesetting case must be resolved within 18 months of the date the proceeding was initiated, unless the commission makes a written determination that the deadline cannot be met.

[40] D.15-03-002 at 30, OP 9.

For pending and active matters, to be protected by the attorney-client privilege, the communications must bear some relationship to the attorney's provision of legal consultation.[41] While billing invoices are generally not made for the purpose of legal representation,[42] *Los Angeles* recognized that information contained within certain invoices may be within the scope of the privilege—perhaps to inform the client of the nature or amount of work occurring in connection with a pending legal issue; or fee totals spent on continuing litigation during a given quarter or year—as either category of information "may come close enough to this heartland to threaten the confidentiality of information directly relevant to the attorney's distinctive professional role."[43] As such, the attorney-client privilege will protect the confidentiality of information in both categories, even if the information happens to be transmitted in a document that is not itself categorically privileged.[44] This protection would even apply to fee totals because as they are communicated during ongoing litigation, "this real-time disclosure of ongoing spending

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[41] 2 Cal.5th 282, 294, citing to *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 370 and *Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 743.

[42] Several decisions have acknowledged that invoices for legal services are not categorically privileged. (*See, e.g. Concepcion v. Amscan Holdings, Inc.* (2014) 223 Cal.App.4th 1309, 1326-1327 ["we seriously doubt that all—or even most—of the information on each of the billing records proffered to the court was privileged."]; and *County of Los Angeles v. Superior Court* (2012) 211 Cal.App.4th 57, 67 ["the dominant purpose for preparing the invoices to the county was not for use in litigation but as part of normal record keeping and to facilitate payment of attorney fees on a regular basis."])

[43] 2 Cal.5th at 296.

[44] But if a matter is concluded, and a party seeks access to fee totals, the information is less likely to be considered privileged.

amounts can indirectly reveal clues about legal strategy, especially when multiple amounts over time are compared."[45]

Fee Totals

For closed proceedings, *Los Angeles* took a more restrictive approach to the application of the privilege to fee totals. It reasoned that invoices that reflected fee totals do not always reveal the substance of legal consultation. Instead, whether the production of an invoice's fee totals from a concluded legal matter would invade the attorney-client privilege turns on whether the fee totals reveal anything about the substance of the legal consultation.

Individual Billing Entries

While a fee total might, in some instances, be subject to disclosure if the total does not reveal anything about legal consultation or communication, *Los Angeles'* holding does not go so far to encompass other aspects of a legal invoice such as individual billing entries or portions of invoices that provide any insight into litigation strategy or legal consultation.[46] As the Court of Appeal determined after *Los Angeles* was remanded,

> billing entries or portions of invoices that describe the work performed for a client therefore fall directly in the heartland protected by the privilege. As to such information, the *Los Angeles County* court does not appear to have differentiated between current and concluded matters. Instead, the court reasoned that such information is 'conveyed for the purpose of …legal representation.[47]

[45] 2 Cal5th at 298.

[46] 2 Cal.5th at 297-298.

[47] 12 Cal.App.5th 1264, 1275.

4.4. It was Proper to File Exhibit D Under Seal and to Restrict Access to those Parties who Had Not Executed the Nondisclosure Agreement

4.4.1. Individual Billing Entries and Fee Totals

At the time that this proceeding was initially pending before the Commission in 2014, it was an open and active proceeding. As such, Exhibit D, which consisted primarily of legal invoices that contained both fee totals and individual billing entries, would be protected from disclosure by the attorney-client privilege, as that privilege has been interpreted and applied by *Los Angeles* (*i.e.* Exhibit D was a document whose fee totals and billing entries provided insights into litigation strategy or legal consultation). The entries and fee totals in the invoices comprise information transmitted between a law firm, County Counsel, and their client, the County of Monterey; that the information was generated within the course of the attorney-client relationship as they were conveyed for the purpose of legal representation and informed the client of the nature and amount of work performed on a pending legal matter; and that the invoices were prepared and transmitted in confidence. As such, the individual billing entries and fee totals in the invoices were privileged, falling squarely within the scope of Evidence Code § 954.

Nor would the individual billing entries and fee totals in the invoices be subject to disclosure under the PRA. Government Code § 6254(k) states that the PRA does not require disclosure of the following records: "records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege." As the California Supreme Court found in *Roberts v. City of Palmdale* (1993) 5 Cal.4th 363, 370, "by its reference to the privileges contained in the

Evidence Code, therefore, the Public Records Act has made the attorney-client privilege applicable to public records."

But parties outside the scope of the attorney-client privilege were not without a remedy. Those parties wanting access to Exhibit D had only to execute the NDA, a process the Commission, and superior courts, have utilized to grant parties access to privileged information for use in an active and pending proceeding.[48] In fact, some of the parties did execute the NDA. And if MCWD had done so as well this dispute over right of access to Exhibit D could have been avoided.

4.4.2. Cost Entries and Supporting Cost Documents

Costs entries and supporting cost documents, as they are part of the attorney-client communication, are also protected from disclosure. In *Costco*, the California Supreme Court recognized that the attorney-client privilege attaches to a confidential communication between the attorney and the client, even if it includes unprivileged material.[49] While cost entries and supporting cost documents may consist of more factual than legal information, the California Supreme Court made it clear that "neither the statutes articulating the attorney-client privilege nor the cases which have interpreted it make any differentiation between factual and legal information."[50] As such, factual information such as costs that are included in a confidential communication transmitted between the attorney and the attorney's client would also be

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[48] *See, e.g., Hecht, Solberg, Robinson, Goldberg & Bagley LLP v. Superior Court* (2006) 137 Cal.App.4th 579, 596; and Decision 08-04-023 (*Decision Adopting Model Protective Order and Nondisclosure Agreement, Resolving Petition for Modification and Ratifying Administrative Law Judge Ruling*) at 2 and Appendix A (Model Protective Order).

[49] 47 Cal.4th at 734.

[50] 47 Cal.4th at 734, quoting *Mitchell v. Superior Court*, *supra,* 37 Cal.3d at 601.

protected by the attorney-client privilege. In reaching this conclusion, the Commission rejects MCWD's argument that Exhibit D, in whatever redacted form, was a public record of a public agency.

4.4.3. Public Documents within Exhibit D

Exhibit D also contains Commission rulings, e-mails, and other documents that would fall within the category that the California Supreme Court in *Mitchell* designated as documents available to the public so the Commission must address if these public documents would be protected from disclosure. Here we find the rationale in *Costco* to be instructive—such factual matter, even if a public document, would nonetheless be covered by the attorney-client privilege because the documents are part of a confidential communication. Our conclusion is also supported by an earlier California Supreme Court decision, *In re Jordan* (1974) 12 Cal.3d 575, 580, in which the Court found that the attorney-client privilege attached to copies of cases and law review articles transmitted by an attorney to the attorney's client. Court supported its finding by examining Evidence Code § 952's definition of confidential communication, noting that confidential communication between a client and a client's lawyer includes "information" that is transmitted and is of potential use to the attorney-client relationship. Accordingly, public documents that are part of Exhibit D would also be protected by the attorney-client privilege.

4.5. Is There Any Information Properly Redacted from Exhibit D on the Grounds It Was Exempted from Disclosure by Any Other Privilege, Confidentiality, or Relevancy Basis?

4.5.1. Right of Privacy

Article 1, § 1 of the California Constitution[51] creates a privacy right that protects individuals of their privacy by private parties.[52] To have a reasonable expectation of privacy, the person seeking to prevent the disclosure of claimed private information must allege (1) a legally protected privacy interest; (2) a reasonable expectation of privacy under the circumstances; and (3) conduct by the defendant that amounts to a serious invasion of the protected privacy interest.[53]

A right of privacy to the claimed personal information of billing attorneys has been established. First, Exhibit D has redacted individual credit card account numbers, frequent flier account information, personal phone numbers, and home addresses. This type of information has been recognized as falling within the scope of Article 1, § 1 of the California Constitution. Second, this information was provided as part of the legal invoices for payment to ensure reimbursement for expenses charged to client or to facilitate the completion of the financial transaction. The information was not disseminated publicly, but only to the client and there is every reason that the individual attorneys would expect the information would remain private. Third, MCWD is seeking an unredacted copy

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[51] All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.

[52] *Gonzales v. Uber Technologies, Inc.* (2008) 305 F.Supp.3d 1078, 1091, citing to *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 327.

[53] *Hill v. National Collegiate Athletic Association* (1994) 7 Cal.4th 1, 35-37.

of Exhibit D, which would include the personal information identified above. Such personal information would be constitutionally protected from disclosure.

The Commission reaches the same conclusion in applying the PRA. Government Code § 6254(c) allows for the withholding of "personal, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy." It is difficult to imagine that personal information such as individual credit card account numbers, frequent flier account information, personal phone numbers, and home addresses would not fall within the scope 6254(c). And even if there were any doubt, the information would be protected by Government Code § 6255(a) which states:

> (a) The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.

MCWD has failed to identify, nor has the Commission found, a public interest that would be served by disclosing the personal information that has been redacted from Exhibit D. In contrast, a clear public interest would be served by not disclosing such personal information since doing so comports with the California Constitution's recognition of a right of privacy.

4.5.2. Relevancy

The final set of redactions from Exhibit D are based on relevancy grounds. These include work in three categories: (1) redactions for work conducted with respect to the Stephen Collins conflict of interest issue because compensation to MCWRA under the Settlement Agreement did not include legal costs incurred

addressing the conflict of interest issue;[54] (2) redactions for entries and costs unrelated to desalination issues; and (3) expense or cost reimbursement for matters or clients not related to the relief requested as to the Settlement Agreement.

The Commission agrees with these redactions as they are not relevant to this proceeding. Evidence Code § 250 defines relevant evidence as follows:

> Relevant evidence" means evidence, including evidence relevant to the credibility of a witness or hearsay declarant, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

As the redactions cover other clients, other matters, and work costs that Cal-Am is not seeking to recover from the ratepayers through this proceeding, the three classes of redactions on relevancy grounds are approved.

4.6. The Right to Assert the Attorney-Client Privilege was not Waived by the Holder of the Privilege[55]

4.6.1. Express or Implied Waiver

The attorney-client privilege may be expressly waived if the "holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone." (Evidence Code § 912(a).) But the California courts have developed a doctrine known as common-interest or

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[54] *Application* at 3, footnote 4 (The claimed recovery for costs advanced to MCWRA under the Regional Desalination Project agreements "includes a reduction in Steve Collins-related costs and corresponding interest."); and Settlement Agreement § 4.F. at 6

[55] MCWRA claims that MCWD should be foreclosed from raising the claim of waiver of the attorney-client privilege because it failed to raise it in its *Application for Rehearing*. (*MCWRA's Response* at 25.) But as MCWRA acknowledges, the *Application for Rehearing* does state that the redacted version of Exhibit D has been disclosed to the Commission, ORA, and to one intervenor party who executed the NDA "so that any remaining claims of privacy or privilege have been waived by MCWRA and Monterey County." (*Application for Rehearing* at 12.) While the waiver argument is not fully developed with appropriate legal citation, the Commission believes that the waiver question has been placed at issue and will be resolved in this decision.

joint-defense doctrine that is an exception to the statutory recognition of waiver. In *OXY Resources California LLC v. Superior Court* (2004) 115 Cal.App.4th 874, 890, the Court explained that in order for a holder of the privilege to invoke the common-interest doctrine, the holder must establish (1) the communicated information would otherwise be protected from disclosure by a claim of privilege; (2) disclosure is reasonably necessary for the accomplishment of the purpose for which the lawyer was consulted. In other words, the privilege will extend to communications which are intended to be confidential if they are made to those third persons on matters of joint concern and reasonably necessary to further the interest of the litigant. (*Id.*, quoting from *Insurance Company of North America v. Superior Court* (1980) 108 Cal.App.3d 758, 765, and 767.); and (3) the disclosing party has a reasonable expectation that a third party will preserve the confidentiality of the communication. (*OXY Resources*, *supra*, 115 Cal.App.4th at 891.) Moreover, since the attorney-client privilege is not limited to litigation-related communications, non-waiver concepts enjoy the same breadth of scope. (*Id.*, at 898.)

The attorney-client privilege may also be impliedly waived if the holder puts the privileged communication in issue and that disclosure is "essential for a fair adjudication of the action." (*Southern California Gas*, *supra*, 50 Cal.3d at 40, citing to *Mitchell*, *supra*, 37 Cal.3d at 609.) *Merritt v. Superior Court* (1970) 9 Cal.App.3d 72, 730, was the first published California decision to recognize the theory of an implied waiver of the attorney-client privilege, reasoning that courts were within their authority to create this exception where the holder of the privilege puts "the state of mind of his attorney at issue."

4.6.2. The Facts Do Not Support Either an Expressed or an Implied Waiver of the Attorney-Client Privilege

4.6.2.1. Express

MCWD sets forth three grounds for a finding of waiver: first, MCWRA provided unredacted invoices to Cal-Am in 2010 pursuant to D.10-08-008 and during settlement discussions; second, by putting the reasonableness of the invoices at issue in the instant proceeding; and third, by failing to mark Exhibit D confidential as required by the recent protocol that this Commission adopted in D.16-08-024.[56]

The Commission rejects each of MCWD's arguments for an express waiver. As to MCWD's first argument, the Commission finds that no waiver occured as a matter of law since the invoices shared with Cal-Am under the common-interest doctrine. The Reimbursement Agreement authorized Cal-Am to advance funds "to MCWD and MCWRA to allow their continued participation in pursuing the proposed Regional Desalination Project…at issue in A.04-09-019."[57] The Reimbursement Agreement provided a means by which the common interest of implementing an agreement to develop a new water supply for the Monterey Peninsula could be achieved. As such, it would have been appropriate under the common-interest doctrine to share the invoices with Cal-Am without waiving the attorney-client privilege.

Second, putting an invoice at issue before the Commission does not result in a waiver of the attorney-client privilege. The Commission recognizes that documentation supporting an issue ripe for consideration may nonetheless be privileged. That is why the Legislature enacted Pub. Util. Code § 583 and the

[56] *MCWD's Motion* at 2, 3, 9, and 10.

[57] D.10-08-008 at 2.

Commission adopted GO 66-C (now GO 66-D) as a way for a party to claim confidentiality while providing the Commission with access to documentation so that the Commission may "determine the reasonableness of an application."[58] The Commission has gone further and created a process by which a party may either file a motion for leave to file under seal pursuant to Rule 11.4, or may seek a protective order from the assigned ALJ in an open proceeding.[59] As Cal-Am availed itself of these options in a timely fashion in the instant proceeding, the recovery of costs invoice being at issue does not waive the attorney-client privilege.

Third, not marking Exhibit D confidential as required by D.16-08-024 does not amount to a waiver as Cal-Am availed itself of other valid means to assert its privileges. Cal-Am's *Application* stated that Exhibit D was confidential and was being tendered for filing pursuant to Rule 11.4, GO 66-C, and Pub. Util. Code § 583. Simultaneously with the *Application*, Cal-Am filed its *Motion to File Confidential Invoices Under Seal Exhibit D to Application* wherein it claimed that Exhibit D was provided during confidential settlement discussions, and that the information redacted from the invoices "concerned information that was attorney-client privileged and protected by the work product doctrine."[60] As such, Cal-Am satisfied the applicable procedural vehicles for asserting a claim of confidentiality.

The more fundamental problem with MCWD's claim that Cal-Am waived its rights by not complying with D.16-08-024 is that MCWD wishes the Commission to apply its decision retroactively, rather than prospectively, to a

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[58] Decision 02-08-068 at 8.

[59] *See, e.g*. Decision 02-04-014 at 4, 5, and footnote 4.

[60] *Cal-Am's Motion* at 2, footnote 3.

case that has already been decided. In California, whether to apply a decision retroactively or prospectively when the decision alters the law "turns on considerations of fairness and public policy." (*Westbrook v. Mihaly* (1970) 2 Cal.3d 765, 800, quoting *Forster Shipbuilding Co. v. County of Los Angeles* (1960) 54 Cal.2d 450, 459.) We do not see how applying D.16-08-024 retroactively to an adopted decision would be fair. D.16-08-024 was not adopted until years after the confidentiality of Exhibit D was first put at issue in this proceeding and two decisions addressing Exhibit D's confidentiality had already been adopted. By our language therein, the Commission adopted, among other things, guidelines for review of confidentiality claims for documents "marked confidential" and submitted "after the effective date of [that] decision." (D.16-08-024 at 19.) We did not intend D.16-08-024 as a vehicle for the Commission to reverse its prior decisions that made confidentiality determinations under previously adopted standards.[61]

To do otherwise would result in a denial of procedural due process for the party adversely impacted, which in this case would be Cal-Am. Using language nearly identical to the U.S. Constitution, the California Constitution states that "a person may not be deprived of life, liberty, or property without due process of law." (Cal. Const. Art. 1, §7(a).) Federal and state due process clauses impose limitations on federal, state, and local agencies with adjudicating authority. An

[61] Nor did the Commission intend for the changed guidelines in GO 66-D to claim confidentiality apply to formal proceedings. Instead, GO66-D, Section 3.3 (Submissions in a Formal Proceeding) provides that "the requirements of Section 3.2 (Submission of Information with a Claim of Confidentiality) do not apply when a party in a formal proceeding files information in the docket. To obtain confidential treatment…the submitter must file a motion pursuant to Rule 11.4 of the Commission's Rules…." Even with the changes to GO 66-D, Cal-Am was still entitled to seek a confidentiality determination by complying with Rule 11.4, which is what it did in this proceeding. Thus, not even the newly enacted GO 66-D alters the authority and application of Rule 11.4 to a formal proceeding such as the instant proceeding.

agency must provide parties with adequate notice and opportunity for a fair hearing *i.e.* an opportunity to be heard "at a meaningful time and in a meaningful manner." (*Today's Fresh Start, Inc. v. Los Angeles County Office of Education* (2013) 57 Cal.4th 197, 212, quoting *Armstrong v. Manzo* (1965) 380 U.S. 545, 552.) To adopt MCWD's position would result in imposing a standard that would result in the revocation of Cal-Am's ability to claim that Exhibit D was protected from disclosure by the attorney-client privilege and the required production of an unredacted version of Exhibit D. Such a result would not be consistent with the California Constitution's requirement that a party be given notice and an opportunity to be heard at a meaningful time and in a meaningful manner.

4.6.2.2. Implied

The Commission also rejects MCWD's claim of an implied waiver. While it is true that Exhibit D is at issue, as we have explained above, the Commission has a process in place so that documents at issue where a claim of confidentiality is asserted may be filed under seal and shared with the parties if they execute a NDA. Cal-Am complied with the Commission's process to claim and protect the asserted confidentiality of Exhibit D. As such, there was no implied waiver.

4.7. Exhibit D's Disclosure During Confidential Settlement Discussions Does Not Waive the Attorney-Client Privilege

Pursuant to Rule 12.6, oral or written settlement communications made during a settlement negotiation must be maintained as confidential:

> No discussion, admission, concession or offer to settle, whether oral or written, made during any negotiation on a settlement shall be subject to discovery, or admissible in any evidentiary hearing against any participant who objects to its admission. Participating parties and their representatives shall hold such discussions, admissions, concessions, and offers to

> settle confidential and shall not disclose them outside the negotiations without the consent of the parties participating in the negotiations.

Any oral or written discussion, admission, or concession made during a settlement discussion that occurred during A.04-09-019, A.09-04-019, and A.12-04-019, and the instant proceeding is subject to Rule 12.6.

But where the dispute arises is whether Exhibit D, a document prepared prior to the settlement discussions and then disclosed at a confidential mediation session, falls within the scope of Rule 12.6. MCWRA argues in the affirmative, reasoning that the scope of Rule 12.6 is broad enough to encompass previously prepared documents that are shared during settlement discussions.[62] MCWD counters and cites *Rojas v. Superior Court* (2004) 33 Cal 4th 407, 417 (citing to Evidence Code § 1120, quoted, *infra*), and *Kullar v. Foot Locker Retail, Inc*. (2008) 168 Cal.App.4th 116, 132 for the proposition that pre-existing non-privileged materials do not become privileged merely by discussing them in settlement negotiations.[63] As Rule 12.6 does not expressly address this question, the Commission can, nonetheless, resolve the issue by looking at the policy behind protecting the confidentiality of mediation sessions and the companion provisions in the Evidence Code that *Rojas* and *Kullar* construe.

California law strongly recognizes that settlement discussions should be confidential. In *Foxgate Homeowners' Association v. Bramalea California, Inc.* (2001) 26 Cal.4th 1, 14, the California Supreme Court explained that "confidentiality is essential to effective mediation," reasoning that confidentiality encourages parties to frankly exchange views, without fear that disclosures might be used

[62] *MCWRA's Response* at 27-28.

[63] *MCWD's Reply* at 9.

against them in later proceedings. (*Accord*, *Fair v. Bakhtiari* (2006) 40 Cal.4th 189, 194.) To accomplish this goal, the Legislature enacted the current versions of the mediation confidentiality statues in 1997 which are codified at Evidence Code §§ 1115 through 1126. (*Cassel v. Superior Court* (2011) 51 Cal.4th 113, 123.) Evidence Code § 1119 states:

> (a) No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.
>
> (b) No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.
>
> (c) All communications, negotiations, or settlement discussions by and between participants in the course of a mediation or a mediation consultation shall remain confidential.

In giving effect to the mediation confidentiality provisions, the courts are clear that these statutes "must be applied in strict accordance with their plain terms." (*Lappe v. Superior Court* (2014) 232 Cal.App.4th 774, 783, quoting *Cassel*, *supra*, 51 Cal.4th at 124.)

While Evidence Code §§ 1115 and 1119 refer to mediation and Rule 12.6 refers to settlement, the two concepts are not in conflict. California recognizes that mediation is a broad concept that can take many forms, the two most common being (1) the traditional mediation where the mediator meets directly

with the parties and assumes a passive role; or (2) a settlement conference where lawyers are present and the mediator takes a more active role in facilitating a settlement. (*See, e.g. Wimsatt v. Superior Court* (2007) 152 Cal.App.4th 137, 150; and *Travelers Casualty & Surety Company v. Superior Court* (2005) 126 Cal.App.4th 1131, 1139.) As such, confidentiality protections provided pursuant to Rule 12.6 would be as expansive as confidentiality protections provided by Evidence Code § 1119.

Of course, the same exceptions to mediation confidentiality would also apply to Rule 12.6, which brings the Commission to the heart of the parties' dispute. The Commission acknowledges the holdings from *Rojas* and *Kullar* that non-privileged documents do not become confidential because they are later disclosed at a mediation, a position that follows from the text of Evidence Code § 1120:

> (a) *Evidence otherwise admissible or subject to discovery* outside of a mediation or a mediation consultation shall not be or become inadmissible or protected from disclosure solely by reason of its introduction or use in a mediation or a mediation consultation. (*Italics* added.)

Yet the flaw in MCWD's argument lies in its belief that Exhibit D is not privileged and, therefore, discoverable. As the Commission has established in this decision,[64] and previously in D.15-03-002,[65] Exhibit D is protected from disclosure by the attorney-client privilege and because it was later shared in confidential settlement discussions. A privileged document that is later shared during a confidential settlement discussion does not lose its privilege and does not fall within the "evidence otherwise admissible or subject to discovery" exception that Evidence Code § 1120 created.

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[64] *Supra*, at Section 4.3.

[65] D.15-03-002, Ordering Paragraph # 4.

Nor do any of the decisions that MCWD cites stand for such a proposition. In *Rojas*, the California Supreme Court addressed whether raw test data, photographs, and written witness statements, not otherwise privileged, would be protected from discovery if they were prepared for use at a mediation. While the California Supreme Court ruled in the affirmative, it also expressed its disapproval of parties using a mediation as a pretext to shield non-privileged materials from disclosure that were used in a mediation but were not prepared for use at a mediation. Similarly, in *Kullar*, the Court drew a distinction between writings prepared for use at a mediation which were not subject to disclosure, and the underlying non-privileged data (such as company payroll records) that the writings were based on that would be subject to discovery. Carried to their logical conclusions, both *Rojas* and *Kullar* are consistent with the findings that the Commission made in this proceeding that Exhibit D was protected by the attorney-client privilege, and would be exempt from disclosure because it was used at a settlement conference.

4.8. What Impact, if any, Does the Unredacted Version of Exhibit D Have on D.15-03-002 and/or D.15-10-052?

As noted in the summary section of this decision, the Substantially Less Redacted Versions of Documents in Exhibit D, which only redacts information that is either private or irrelevant to the Regional Desalination Project, has now been made available to the parties. Even if the parties had access to that version of Exhibit D and had an opportunity to present arguments at the evidentiary hearing or comment prior to the Commission's adoption of D.15-03-002, there is nothing in the Substantially Less Redacted Versions of Documents in Exhibit D that would cause the Commission to amend, modify, or reverse either D.15-03-002 or D.15-10-052. We reach this conclusion on multiple grounds:

The unredacted invoice billing entries do not alter the outcome of the decisions since the Commission authorized the recovery of these costs based on prior Commission precedent. Ordering Paragraph 2 states:

> The Commission Authorizes California-American Water Company's (Cal-Am's) recovery of $1,918,033, plus interest and fees pursuant to Decision 10-08-008 and Decision 11-09-039, through Cal-Am's Special Request Surcharge Balancing Account, which equates to its request of $2,682,590 minus $764,557. This disallowance does not prejudice or prejudge any future request by Cal-Am for recovery of the $764,557 in a future application.

The two referenced decisions had put into place a mechanism for Cal-Am's recovery of costs related to its water projects. D.10-08-008 approved a Partial Settlement Agreement and Reimbursement Agreement between Cal-Am and the Division of Ratepayer Advocates (now known as the Public Advocates Office), wherein the Commission authorized Cal-Am's recovery of Coastal Water Project costs up until December 31, 2008, through the Special Request 1 Surcharge Balancing Account that the Commission authorized in Decision 06-12-040.[66] If the Regional Desalination Project was built, the County and MCWRA would repay the advances, with interest, and "to the extent that these funds are not repaid, it is reasonable for ratepayers to be responsible for funding associated with the Environmental and Test Well Development Scopes of Work." (D.10-08-008 at 20.) In D.11-09-039, the Commission partially granted Cal-Am's Petition to Modify D.06-12-040 and increased the Special Request 1 Surcharge in order to allow for the recovery of incurred pre-construction costs related to Cal-Am's Coastal Water Project.[67]

[66] D.10-08-008, OP #2.

[67] D.11-09-039, OP #2.

But MCWD never challenged these predicate Commission authorities that were part of the basis of D.15-03-002's authorization to Cal-Am to recover $1,918,033. Instead, MCWD argued that (1) D.15-03-002 erroneously maintained Exhibit D under seal; and (2) to the extent that the Commission approved paragraph 7 entitled County Ordinance Preemption of the Settlement Agreement with County and MCWRA, it approved an illegal and unconstitutional agreement. As a result of that failure to identify the issue as part of the Application for Rehearing, Pub. Util. Code §§ 1731(b)(1)[68] and 1732[69] precludes MCWD from now challenging that aspect of D.15-03-002.

Nor did MCWD attempt to challenge the Commission's precedent when it sought relief in the California Supreme Court. In its *Petition*, MCWD presented three issues: (1) did the Commission commit constitutional error in denying unrestricted access to Exhibit D; (2) was any claim of confidentiality or privilege waived by the public agency's disclosure of an unredacted version of Exhibit D to a third party; and (3) the Court's grant and holding in this case in light of review having been granted in *Los Angeles County Board of Supervisors v. Superior Court* (*American Civil Liberties Union*), No. S226645. Even if the California

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[68] "(b)(1) After an order or decision has been made by the commission, a party to the action or proceeding, or a stockholder, bondholder, or other party pecuniarily interested in the public utility affected may apply for a rehearing in respect to matters determined in the action or proceeding and specified in the application for rehearing. The commission may grant and hold a rehearing on those matters, if in its judgment sufficient reason is made to appear. A cause of action arising out of any order or decision of the commission shall not accrue in any court to any corporation or person unless the corporation or person has filed an application to the commission for a rehearing within 30 days after the date of issuance or within 10 days after the date of issuance in the case of an order issued pursuant to either Article 5 (commencing with Section 816) or Article 6 (commencing with Section 851) of Chapter 4 relating to security transactions and the transfer or encumbrance of utility property." (Underlining added.)

[69] "The application for a rehearing shall set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful. No corporation or person shall in any court urge or rely on any ground not set forth in the application."

Supreme Court had issued a decision in MCWD's favor, such a decision would not have resulted in a reversal of D.15-03-002 because the Commission precedent that served as the foundation to support the decision had not been challenged.

In sum, even if MCWD received an unredacted version of Exhibit D, the Commission's outcome in D.15-03-002 and, by extension, D.15-10-052, would remain the same.

5. Categorization and Need for Hearing

This proceeding has been categorized as ratesetting.

Following the remand order from the California Supreme Court, it was determined that hearings would not be necessary.

6. Comments on Proposed Decision

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on _____, and reply comments were filed on _____ by _____.

7. Assignment of Proceeding

Michael Picker is the assigned Commissioner and Robert M. Mason III is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. On May 24, 2013, Cal-Am filed the instant proceeding seeking approval of the settlement reached in *San Francisco Litigation I*, approval of Cal-Am's payment of MCWRA's project costs including legal fees and costs incurred in connection with A.04-09-019, and rate recovery for Cal-Am in the amount of its settlement payment to MCWRA.

2. As part of its application, Cal-Am filed Exhibit D under seal, and concurrently with its application filed a *Motion to File Confidential Invoices Under Seal Exhibit D to Application* (*Motion to File Under Seal*) pursuant to Rule 11.4, General Order 66-C, and Pub. Util. Code § 583. Cal-Am asserted that the invoices were provided by MCWRA and County during confidential settlement discussions, and contained redactions of information protected by the attorney-client privilege and work product protection.

3. On August 19, 2013, the then assigned Administrative Law Judge Seaneen Wilson issued her *Ruling* granting Cal-Am's *Motion to File Under Seal* and approved the terms of a protective order and a NDA. Parties who signed the NDA would be given access to Exhibit D for use only in the instant proceeding.

4. MCWD elected not to execute the NDA.

5. On July 1, 2015, Cal-Am and MCWRA filed a new lawsuit in the San Francisco Superior Court entitled *California-American Water Company, et al., v. Marina Coast Water District, et al, and Related Cross Claims and Consolidated Actions*, Case No. CGC-15-546632.

6. On November 19, 2018, MCWRA and County filed a *Notice of Production in Discovery in Pending Civil Litigation of Substantially Less Redacted Versions of Documents in Exhibit D to Application in This Proceeding*. The *Notice* states that in the pending *San Francisco Litigation II*, MCWRA produced what it termed a "substantially less redacted" version of Exhibit D, with the remaining redactions falling into two categories:

   a. Sensitive personal information such as credit card numbers, account numbers for frequent flier or traveler clubs, account numbers for venders or suppliers, telephone numbers, and addresses; and
   b. Document content that describes attorney services, tasks performed by MCWRA personnel, and

expenses, if they were unrelated to desalination project issues or the Stephen Collins conflict of interest issue.

7. On November 19, 2018, MCWRA filed its *Notice of Substantially Less Redacted Versions of Documents in Exhibit D to Application in this Proceeding*. The remaining redactions fell into two categories:

a. Sensitive personal information such as credit card numbers, account numbers, or frequent flier accounts, numbers, telephone numbers, and addresses; and

b. Documents contents that describe attorney services and tasks performed on matters unrelated to the Regional Desalination Project issues.

8. On May 24, 2019, counsel for MCWRA hand delivered a copy of Substantially Less Redacted Versions of Documents in Exhibit D in DVD format to the newly assigned Administrative Law Judge Robert M. Mason III. Exhibit D is 755 pages of documents Bates stamped MCWRA03781-MCWRA04974, consisting of:

- Invoices from the law firm of Downey Brand with related costs;
- Invoices from County Counsel for the County of Monterey with related costs;
- Invoices summarizing legal fees and costs;
- Cost invoices for legal fees and expenses; and
- Miscellaneous non-privileged documents.

9. Following the remand order from the California Supreme Court, this proceeding was reopened.

Conclusions of Law

1. It is reasonable to conclude that this proceeding is pending and active.

2. Since this proceeding is pending and active, it is reasonable to conclude that the entries in Exhibit D that reflect fee totals, individual billing entries, and costs are protected by the attorney-client privilege.

3. It is reasonable to conclude that information in Exhibit D was properly redacted on attorney-client privilege, privacy, and relevancy grounds.

4. It is reasonable to conclude that there was no waiver of the attorney-client privilege when the unredacted version of Exhibit D was shared with Cal-Am because it was shared under the common-interest doctrine.

5. It is reasonable to conclude that there was no waiver of the attorney-client privilege when the unredacted version of Exhibit D was disclosed during settlement discussions.

O R D E R

IT IS ORDERED that:

1. Decision 15-03-002 is affirmed.
2. Decision 15-10-052 is affirmed.
3. This proceeding is closed.

This order is effective today.

Dated _____, at Los Angeles, California.